84-388

No.

Office Supreme Court, U.S.
FILED
SEP 10 1984
ALEXANDER L. STEVAS.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PEGGY MARSHALL, Petitioner,

v.

CAROLYN P. McMAHAN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

J. D. Lee*
14th Floor, Andrew Johnson Plaza
912 S. Gay Street
Knoxville, TN 37923
615/544-0101

Sandra G. Olive
Suite 504
9051 Executive Park Dr.
Knoxville, TN 37923
615/690-5300

ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTIONS PRESENTED

1. Is a Clerk and Master of a Chancery Court of Tennessee (Petitioner) deprived of the due process of law accorded her by the Fourteenth Amendment, § 1, of the United States Constitution, as further defined by the Statutes and case law of the State of Tennessee, when:

(a) The Clerk and Master is removed from office by an ex parte order of the Chancellor, without prior notice or hearing.

(b) At the time of removal, the Clerk and Master held an appointment for an unexpired full term, said appointment having been given her by a former Chancellor;

(c) The sole basis of the Clerk and Master's removal was a challenge to the validity of her former appointment and the right, therefore, to continue holding office under that appointment for the remaining one and a half years of a full term of six years;

(d) No attempt was made to comply with the laws of the State of Tennessee regarding removal of public officers or challenging a public official's right to hold office; and

(e) The only "hearing" held occurred seven months after removal and occurred in the form of a Motion initiated by the Clerk and Master to set aside the invalid order of removal entered by the incumbent Chancellor?

2. Even if the "hearing" eventually accorded Petitioner in the Chancery Court in this cause is held by this Court to have been sufficient to determine Petitioner's ultimate right to continue holding her office, was Petitioner nevertheless denied due process of law under the United States Constitution, Fourteenth Amendment, § 1, by being immediately removed from office prior to such hearing and/or prior to the time the order removing her was deemed under Tennessee law to be "final"?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

PEGGY MARSHALL, Petitioner

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CAROLYN P. McMAHAN

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
STATE OF TENNESSEE

A writ of certiorari is respectfully sought to review the Supreme Court of Tennessee's Opinion affirming the judgment of the Sevier County Chancery Court, which judgment upheld the validity of an ex parte order removing Petitioner from her office as Clerk and Master.

List of Parties. All of the parties in the Supreme Court of the State of Tennessee are listed in the caption.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, at Knoxville, entered May 7, 1984, is reported at 670 S.W.2d 215 (Tenn. 1984).

The opinion of the Supreme Court of Tennessee, at Knoxville, denying Petitioner's Petition to Rehear, entered on June 11, 1984, is not reported and is reproduced in Appendix A to this Petition.

The final order of the Chancery Court for Sevier County, Tennessee, overruling Petitioner's Motion to set aside the ex parte order removing her from office is not reported. The order and supporting memorandum opinion of the trial court is reproduced in Appendix B to this Petition.

The ex parte order entered in the Chancery Court of Sevier County, Tennessee, removing Petitioner from office is not reported. It was entered as Exhibit Two to the record (R. Vol. II, p. 3) and is reproduced in Appendix C to this Petition.

JURISDICTION

The final opinion of the Supreme Court of Tennessee was entered on May 7, 1984. The Supreme Court of Tennessee's order denying Petitioner's timely Petition to Rehear was denied by an opinion entered on June 11, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), in that Petitioner has been denied the rights and privileges of due process guaranteed her by the United States Constitution, Amendment 14, § 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1, to the United States Constitution provides in relevant part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

2. This case also involves, in defining the due process required under the facts of

this case, the following Tennessee Constitutional and Statutory provisions:

(a) The Tennessee Constitution, Article 6, § 13, provides in pertinent part:

> Clerks of courts--. . .Chancellors shall appoint their clerks and masters, who shall hold their offices fo six years. . . . Any Clerk may be removed from office for malfeasance, incompetency or neglect of duty, in such manner as may be prescribed by law.

(b) Tennessee Code Annotated (TCA) Section 18-5-101 states:

> 18-5-101. Appointment--Tenure.--The clerks of the chancery courts are appointed by the respective chancellors, and hold their offices for six (6) years . . . .

(c) T.C.A. § 8-48-101, et seq. state in pertitent part:

> 8-48-101. Causes of vacancies.--Any office in this state is vacated:
>
> . . .
>
> (4) By the decision of a competent tribunal declaring the election or appointment void or the office vacant;
>
> . . .

8-48-106. Certification of judgment of vacancy.--Whenever there is a final judgment of a competent tribunal, declaring any election or appointment void, or any office vacated, such judgment shall promptly be certified by the clerk to the appointing power or power whose duty it is to take steps to fill the vacancy. . . .

(d) T.C.A. § 18-1-301, et seq. state in pertinent part:

18-1-301. Grounds for removal.-- The Court may remove its clerk:

(1) Upon conviction of a misdemeanor in office or of a felony;
(2) For nonresidence in the county in which the court is held;
(3) For failing to give security as required by law;
(4) For failing to pay over public moneys or moneys collected officially;
(5) For incapacity, neglect of duty, or misbehavior in office; and
(6) For any other cause to which the penalty of removal from office is attached by law. . . .

18-1-303. Proof of improper conduct of office.--The failure to pay over money collected officially, incapacity, neglect of duty, and misbehavior in office may be shown by the record of a suit, by motion, or otherwise founded upon one (1) of the causes, and decided adversely to the clerk; or charges may be exhibited to the court, in writing by any person, and satisfactorily es-

tablished by proof, the clerk having a right to be heard in defense, and to an appeal, as in other cases. . . .

(e) T.C.A. § 8-47-101, et seq., Chapter 47, Removal of Officers, state in pertinent part:

> 8-47-101. Officers subject to removal.--Grounds.--Every person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, except such officers as are by the constitution removable only and exclusively by methods other than those provided in this chapter, who shall knowingly or willfully misconduct himself in office, or who shall knowlingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his office and shall be ousted from such office in the manner hereinafter provided. . . .
>
> . . .
>
> 8-47-110. Petition in name of state--Filing by realtors.--The petition or complaint shall be in the name of the state and may be filed upon the relation of the attorney general of the state, or the district attorney for

the state, or the county attorney in the case of county officers, and of the city attorney, or the district attorney general, in the case of municipal officers; and in all cases it may be filed, without the concurrence of any of said officers, upon the relation of ten (10) or more citizens and freeholders of the state, county, or city, as the case may be, upon their giving the usual security for costs. . . .

. . .

8-47-114. Summons--Time to answer.--Upon the filing of the complaint or petition for the writ of ouster, a summons shall issue for the defendant, and there shall accompany the summons and be served upon the defendant, a copy of the complaint or petition filed against him, and the defendant shall have the right to answer within twenty (20) days from such service.

8-47-115. Pleadings. The petition and answer shall constitute the only pleadings allowed, and all allegations in the answer shall be deemed controverted, and any and all questions as to the sufficiency of the petition or complaint shall be raised and determined upon the trial of the case, and if such petition or complaint is held to be insufficient in form, the same shall be amended at once, and such amendment shall not delay the trial of the case. . . .

. . .

8-47-117. Hearing on suspension. No person shall be suspended under the provisions of this chapter until at least five (5) days' notice of the application for the order of suspension shall be served upon him, which notice shall set forth the time and place of the hearing of said application and said officer shall have the right to appear and make any defense that he may have, and shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order of suspension; and no order of suspension of good cause therefor. . . .

8-47-118. Application of chancery procedure.--The proceedings under this chapter, whether in the circuit, chancery, or criminal courts, shall be conducted in accordance with the procedure of courts of chancery, where not otherwise expressly provided herein; and all of said courts having cognizance of such proceedings are hereby given the full jurisdiction and powers of courts of equity with respect to such proceedings. . . .

(f) T. C. A. § 29-35-101, et seq.

(Tennessee quo warranto statutes) state in pertinent part:

29-35-101. Grounds for action.--An action lies in the name of the state against the person or corporation offending, in the following cases:

(1) Whenever any person unlawfully holds or exercises any public office or franchise within this state, or any office

in any corporation created by the laws of this state;
(2) Whenever any public officer has done, or suffered to be done, any act which works a forfeiture of his office;
(3) When any persons act as a corporation within this state, without being authorized by law;. . . .

. . .

29-35-109. Officers entitled to bring suit.--The suit is brought by the attorney general for the district or county, when directed so to do by the general assembly, or by the governor and attorney general of the state concurring . . . .

29-35-110. Suit on relation of private individual.--(a) It is also brought on the information of any person, upon such person giving security for the costs of the proceedings, to be approved by the clerk of the court in which the bill is filed.
(b) when the suit is brought at the relation of a private individual, it shall be so stated in the bill and proceedings, and such individual is responsible for costs in case they are not adjudged against the defendant
. . . .

29-35-111. Bill in equity--Venue.--The suit is brought by bill in equity, filed in either the circuit or chancery court of the county in which the office is usurped or held. . . .

. . .

> 29-35-116. Judgment of exclusion from office or franchise.--When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs. . . .

STATEMENT OF THE CASE

The Petitioner served as Clerk and Master of the Sevier County, Tennessee, Chancery Court, 13th Division, under a reappointment to a full term by Chancellor James C. McSween, Jr. (The appointment and oath of office was Exhibit 1 to the record below (R. Vol. II, p. 3) and is reproduced in Appendix D to this petition.)

On January 19, 1983, with only one and one-half years remaining of Petitioner's appointment, Chancellor Chester S. Rainwater, Jr., without any prior notice and/or any type of hearing (R. Vol. I, p. 1 and Exhibit 3 to record), signed and entered an order in the Sevier County Chancery Court declaring Petitioner a holdover in her office as Clerk

and Master and appointing a replacement (Appendix C). No reasons for the Chancellor's decision were given in the order. On February 10, 1983, before the Chancellor's order became final under Tennessee law, Petitioner filed a motion to set aside the order removing her from office and asked for reinstatement and her accrued emoluments of office since her removal.

Another Judge, Richard E. Ladd, was designated to hear Petitioner's Motion. On August 23, 1983, seven months after Petitioner filed her motion, the matter was set for hearing; and Petitioner appeared with counsel to argue the invalidity of the order removing her from office. The only party appearing in opposition was the Clerk and Master, Carolyn P. McMahan, who had been appointed by Chancellor Rainwater in Petitioner's stead. Counsel for Carolyn McMahan advanced several theories regarding the invalidity of Petitioner's June 1, 1978

appointment; but there appeared nothing in the record to suggest what Chancellor Rainwater's reasons for removal of Petitioner had been.

At the hearing, it was stipulated and agreed that the Petitioner was not removed for cause nor charged with any wrongdoing in office (R. Vol. II, p. 5,8). However, Judge Ladd, in support of his decision, charged Petitioner with "choos[ing] a time of favorable political waters, to resign . . . ." and found that Petitioner's re-appointment "shock[ed] the conscience of this Court." (See Appendix B, Memorandum Opinion, pgs. 5-6.) No evidence was ever presented by either side to support these findings.

At the conclusion of the hearing on Petitioner's motion, Judge Ladd held that (Appendix B):

> Thus, under these facts, had Ms. Marshall's term of six years expired on January 19, 1983, and was she holding office, or was she holding office as a hold-over under

> Article 7, Section 5 of the Constitution. That's really the sole issue in this matter. (Emphasis added.)

Judge Ladd thereby avoided any reference or discussion as to the method by which Petitioner was removed.

Judge Ladd then proceeded to hold that Petitioner's appointment by Chancellor McSween was void and that Petitioner was in fact holding over on January 19, 1983. He upheld Chancellor Rainwater's order removing Petitioner from office.

The Tennessee Supreme Court heard a direct appeal of Judge Ladd's decision and announced its decision on May 7, 1984. The Court considered its opinion to be significant enough to require publication. The court held:

> We hold, therefore, that the term of office of each Clerk and Master begins with the date of his appointment by the Chancellor and extends for six (6) years thereafter, unless it be interrupted by death, removal as provided by law, or by resignation. Then, upon

> the appointment of a new Clerk and Master his term shall be for the period of six (6) years next ensuing after this appointment.
>
> Moreover, we fully agree with the conclusion of the Chancellor that the term of a Clerk and Master may not be manipulated and altered from the course set by the law as above stated, by his feigned resignation and a simultaneous reappointment by the Chancellor prior to the termination of the current term of office of six (6) years. Such bogus 'resignations and reappointments' are to be disregarded in determining the lawful tenure of a Clerk and Master. Of course, a Clerk and Master may lawfully resign his office prior to the expiration of his six (6) year term of office; but, if he does so, he may not be reappointed to that office unless some other person has intervened as such Clerk and Master by a bona fide appointment.

The Petitioner subsequently filed a petition to rehear, which was denied without a statement of reasons (Appendix A).

How the Federal question was raised and passed upon.

This subpart of Petitioner's petition is particularly significant in this case, because when this Court examines the opinions

of both the trial court and the Tennessee Supreme Court, there will appear therein no discussion of Petitioner's constitutional and procedural objections. The Supreme Court alluded in its opinion to the fact that the Petitioner "also asserted that her rights had been denied because she was given no notice prior to the entry of that order that she was to be removed and a successor appointed." 670 S.W.2d at 216. However, this is the only mention of Petitioner's procedural objections, the Supreme Court then designating Petitioner's hearing on her motion as a "trial on the merits." 670 S.W.2d at 216.

In Petitioner's original brief of law in the Supreme Court of Tennessee, Petitioner asserted:

> Appellant, Peggy Marshall, has certain property rights in her office of which she cannot be wrongfully deprived without violating the due process of law provisions of the Tennessee Constitution, Article 1, § 8 and § 17, and the United States Constitution, Amendment 14, § 1.

Further, Petitioner asserted in her brief:

> In making sure these property rights in office are protected in observance of due process and the law of the land clauses of the United States and Tennessee Constitutions, the legislature has passed various statutes dealing with methods of removing public officials from office; and it is contended that they are the sole and exclusive method of removal; because permitting the use of methods of removal not in accordance with these statutes would leave public officials subject to 'arbitrary exercise of powers of government' officials, which is contra to principles of due process cited above.

Finally, Petitioner made it clear to the Supreme Court that her procedural objections overrode all other issues:

> We respectfully submit that this court cannot property rule on the question of whether or not Appellant's appointment by Judge McSween was or was not void because of the fact that the only lawful means of testing the validity of Appellant's appointment and obtaining 'a final judgment of a competent tribunal,' according to T.C.A. § 8-48-101 was through initiation of a quo warranto proceeding which was not done in this cause.

After the entry of the Supreme Court's opinion, the Petitioner attempted in her Petition to Rehear to persuade the court of the importance of dealing with the constitutional and due process issues presented and to point out that the court's decision was "in conflict with the prior decisions and with the statutes of this state, and the U.S. and Tennessee Constitutions' due process clauses." The entire petition was dedicated to this one goal, pointing out to the Supreme Court its former decisions in similar cases. As shown by the court's denial of Petitioner's petition to rehear (Appendix A), the Supreme Court again refused to comment on these important issues.

It is appropriate to point out to the Court at this time that, especially in view of this Court's policy of looking to state law in determining when a federal question must be raised (See, e.g., Street v. New York, 394 U.S. 576, 583, (1969) and People of State of New

York v. Zimmerman, 49 S.Ct. 61, 63 (1928), that the rule in Tennessee as to the raising of constitutional questions in the Appellate Courts is set forth in the Tennessee Supreme Court case of Veach v. State, 491 S.W.2d 81, 83 (Tenn. 1973):

> In fairness to the trial judge, we should point out that the question of the constitutionality of the statute was not urged during the trial of this cause nor in the motion for a new trial. It was raised in this court for the first time.
>
> Generally, appellate courts review only questions presented for determination in the trial court. . . .
>
> However, a constitutional question may be raised at any time. Shaw v. Woodruff, et al, 156 Tenn. 529, 3 S.W.2d 167 (1928).
>
> Also, the rule will be waived in cases involving the deprivation of life or liberty. . . .

This rule has never been changed except when a party is challenging the constitutionality of a statute, which is not the case here.

In the trial court, the only pleading filed by Petitioner was a motion, in which

Petitioner charged, as recognized in the Supreme Court's opinion, (R. Vol. I, p. 2):

> 6. Her appointment of June 1, 1978, has been recognized by Chancellor Chester S. Rainwater since his becoming Chancellor and she has operated her office under the understanding of a six-year appointment.
>
> 7. Peggy Marshall was never afforded notice that her appointment under date of June 1, 1978 was for anything other than six years.
>
> 8. No charges of violation of her oath of office, or constitutional or statutory duties of her office have been brought against Peggy Marshall during her aforestated tenure dated June 1, 1978, nor were there any proceedings, notice or charges or otherwise declaring her appointment void, office vacated or vacancy existing as provided by Tennessee Code Annotated § 8-48-101, Causes of vacancies.
>
> 9. Peggy Marshall was never notified that she was going to be usurped from office, and never given a chance to be heard and was never afforded the opportunity to respond that no vacancy existed should the Chancellor believe that one did exist.
>
> . . .
>
> 13. The order of January 19, 1983, is void.

The Petitioner additionally filed an affidavit (R. Vol. II, p. 4, Exhibit 3 to the record) stating she had received no notice or any type of hearing prior to the time the Chancellor declared a vacancy and dismissed Petitioner from office. Both parties filed trial briefs, and great reliance was placed by Petitioner on her trial brief to set forth the exact theories as to <u>why</u> the act of Chancellor Rainwater in removing Petitioner from office was illegal; and such brief was constantly alluded to without objection by the trial court or opposing counsel (R. Vol. II, p. 10, 12, and 17); but unfortunately and admittedly the trial brief is not part of the trial record. In that trial brief, which is on file in the Chancery Court, the Petitioner asserted:

> Peggy Marshall, although having no vested right to her office, does have certain property rights in her office of which she cannot be wrongfully deprived without violating the due process of law provisions of the Tennessee Constitution, Article 1, § 8 and § 17, and the United States Constitution, Amendment 14, § 1.

Petitioner's main goal as exhibited in the transcript of the motion hearing was to convince the trial court of the procedural defectiveness of Chancellor Rainwater's actions in removing Petitioner from office as he did. For example, (R. Vol. II, p. 22-24):

> MRS. OLIVE: Well, the only thing that bothered me about it, your Honor, is I wanted to make sure that we understand each other. If you are saying that Chancellor Rainwater, or any Chancellor, is allowed to question the valid -- or anappointment of his former Chancellor and of his current clerk and master to a six year term, and that appointment says that she is appointed to a full year term, I am saying that the only way that can be challenged is through a quo warranto proceeding. Now, to say he is right and if her term of office did expire, that question itself, when you have an Order down by Judge McSween appointing her a valid appointment to challenge that appointment has to go on a quo warranto proceeding.
>
> THE COURT: So, and I got to clear it with Mr. Lee, I want to get clear with you. Are you saying even if the Chancellor was correct in his interpretation of the Constitutes, (sic) Statutes and case law in Tennessee that the method that he did it was incorrect?
>
> MRS. OLIVE: I'm saying that the Chancellor had no authority under the Con-

stitution of (sic) the laws of this State to challenge that six year appointment of Judge McSween, without a quo warranto proceeding. There is no way we can determine if he is right in this hearing. . . .

. . .

THE COURT: ----I will re-open the offer of offering any proof you want, in any form, here today so we can resolve this question. That's why I asked it to start with. I don't want either side to get hung up on some kind of procedural question here.

MRS. OLIVE: I just want to lead up to it. The Order went down and dismissed Ms. Marshall. One day she was in office and one day she was out. O.k. the burden was on her, of course, at the time to bring this back to the Court's attention and state that this Order was invalid. Now, our basic position is that there is no authority for the Chancellor to question this appointment by virtue of the proceeding and the method that he chose. . . .

REASONS FOR GRANTING THE WRIT

The State Supreme Court of Tennessee in this case has, in effect, decided a Federal Question of Substance Not in Accord with Applicable Decisions of this Court.

As already pointed out to this Court, although recognizing in its printed opinion that Petitioner "asserted her rights had been denied because she was given no notice prior to the entry of that order that she was to be removed and a successor appointed," the Supreme Court of Tennessee has chosen to ignore this important issue and has in effect denied Petitioner's due process claim. In fact, the effect of published opinion is to distort what really took place procedurally by designating Petitioner's hearing a "trial on the merits."

Petitioner was not afforded the due process required by this Court before being deprived of her property interest in her office as Clerk and Master.

In the United States Supreme Court cases of Perry v. Sindermann, 408 U.S. 593, (1972) and Board of Regents of State Colleges v. Roth, 408 U.S. 578 (1972), this Court stressed

the importance of referring to state law and "rules or understandings that support claims of entitlement to those benefits," to determine whether individuals have property interests in their employment which would be protected by procedural due process. An examination of the applicable statutes in Tennessee, set forth in this brief, along with the Tennessee constitutional provisions granting a Clerk and Master a six-year appointment, and the existence of a full term appointment of Petitioner (Appendix D) beginning in June 1978, should reveal to this Court that Petitioner bases her claim to her property interest in her public office of Clerk and Master on a sound foundation. When these statutory, contractual and constitutional provisions are combined with the fact that Petitioner had served four and a half years of her six-year appointment before her precipitous removal, it can also be seen that she had a legitimate expectation that she was

serving under an appointment, not at the will of Chancellor Rainwater. There was no evidence in the record to indicate that he ever had challenged her appointment prior to the entry of his January 1983 order.

Petitioner's Property Rights in her Office as Clerk and Master are Inextricably Interwoven with the Procedures Set Forth under Tennessee Law for Challenging that Appointment.

The actions taken against Petitioner in no way comply with the procedural due process set forth in the Tennessee Statutes themselves. There was no attempt to convene a "competent tribunal" nor to await the finality of the decision of that competent tribunal before declaring Petitioner's appointment void, as required by T.C.A. § 8-48-101, et seq., or to give the Petitioner the benefit of any type of hearing. Tennessee Law, as set forth in its quo warranto statutes and the statutes relating to the removal power of judges over

their clerks, all quoted in a previous section of this brief, make it extremely questionable whether Chancellor Rainwater even had the power to initiate action against Petitioner in the first place, when the basis of this challenge was the invalidity of her appointment. Therefore, any procedure which he may have devised for her removal was illegal and could not have afforded Petitioner the procedural due process to which she was entitled.

In this case, Petitioner was not being removed for cause nor misbehavior. It is obvious that the Chancellor had his reasons for removing Petitioner, though these reasons were not stated in his order and he did not participate in the Petitioner's motion hearing. However, the interest of the state in allowing this type of removal of a public official prior to notice or hearing violates the principles of balancing competing interests of the state and the individual to determine what procedures comply with procedural due process, as set

forth by this Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) and Arnett v. Kennedy, 416 U.S. 134 (1974).

The action taken against Petitioner was in effect a "summary dismissal from public employment, without hearing or inquiry required by due process," which was proscribed by this Court in Connell v. Higginbotham, 403 U.S. 207 (1971). The Tennessee Supreme Court attempted to turn Petitioner's motion hearing into a hearing on the merits, but such motion hearing was for the purpose of challenging the Chancellor's method of removing the Petitioner from office and arguing the rights to which she was entitled and was never intended by Petitioner to be a full hearing on the background behind Petitioner's June 1, 1978 appointment.

CONCLUSION

The actions of the removing official, Chancellor Rainwater, constituted a severe deprivation of Petitioner's due process rights

guaranteed her under the Fourteenth Amendment of the United States Constitution.

Petitioner's rights to continue serving under her full term (6-year) appointment were guaranteed her by the Tennessee Constitution and statutes and her appointment by Chancellor McSween on June 1, 1978. Petitioner's rights to this appointment are secured to her unless and until proper procedures are taken under the laws of this state to remove her from office; and, therefore, her property right to her office and the emoluments thereof are in part defined by the removal procedures themselves.

The Supreme Court of Tennessee has now formulated a new precedent in this state for removing appointed public officials outside of all the due process procedural statutory safeguards provided by the Tennessee Legislature. In order to do so, it has, with

all due respect, justified its actions by a "bootstrap" argument which in effect says that Petitioner has no due process rights because her appointment was void, without addressing the constitutionality of the method by which that decision was made. It has upheld an unconstitutional illegal act--that of allowing a public official of this state to ignore legislatively mandated procedures and to unilaterally review the circumstances surrounding his/her subordinates' official appointments and to remove and replace these subordinates--who are likewise public officials--without even prior notice or hearing. Especially in this fact situation, it has given Chancellors unwarranted power over the Clerk and Masters of the Chancery Courts of this state.

Therefore, we respectfully request this Court to either grant certiorari in this cause or, in the alternative, to grant

summary reversal of the Tennessee Supreme Court's actions herein.

Respectfully submitted,

J.D. Lee*
14th Floor, Andrew
Johnson Plaza
912 S. Gay Street
Knoxville, TN 37923
615/544-0101

Sandra G. Olive
Suite 504
9051 Executive Park Drive
Knoxville, TN 37923
615/690-5300

ATTORNEYS FOR PETITIONER

*Counsel of Record

APPENDIX A

June 11, 1984
NOT FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

RE: APPOINTMENT OF	X	Appeal from the Chancery
	X	Court for Sevier County
CLERK AND MASTER	X	
	X	Hon. Richard E. Ladd,
FOR SEVIER COUNTY,	X	Judge
	X	Sitting by Designation
	X	

OPINION ON PETITION TO REHEAR

The Court has considered the Appellant's Petition to Rehear and is of the opinion that the same should be and is hereby overruled.

The Petition to Rehear is denied at the cost of the Appellant, Peggy Marshall.

/S/
BROCK, J.

Cooper, C.J., Fones and
Harbison, JJ., and Tatum,
Sp. J., Concur.

APPENDIX B

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

Chancery Court Filed
Sept. 19, 1983
11:55 A.M.

In re:

APPOINTMENT OF CLERK AND MASTER

No. 83-02-065

ORDER

This cause came on to be heard before the Honorable Richard E. Ladd, Chancellor, by designation, on the 23d day of August, 1983, upon the motion filed by Peggy Marshall February 10, 1983, to vacate the order in this cause entered January 19, 1983, appointing Carolyn P. McMahan Clerk and Master of this Court, and to reinstate Peggy Marshall as Clerk and Master of Sevier County. After consideration of the motion, the briefs of counsel for Peggy Marshall and for Carolyn P. McMahan, the exhibits introduced, the argument of counsel, and the entire record in the cause, the Court announced its memorandum opinion from the bench, the transcript of which the Court directs to be filed in this cause and which opinion is incorporated in this order by reference as fully as if copied herein verbatim.

It is accordingly, ORDERED, ADJUDGED, and DECREED that the reappointment of Peggy Marshall June 1, 1978, immediately after her resignation as Clerk and Master on said date, is void and of no effect. The said Peggy Marshall having been first appointed Clerk and Master on September 18, 1964, her six-year term of office expired September 18, 1970, her second term of office expired September 18, 1976, and her third appointment would have expired September 18, 1982. The Court holds that there has been no valid appointment of a Clerk and Master of Sevier County since September 18, 1982, and that at January 19, 1983, Peggy Marshall was holding the office of Clerk and Master only as a hold-over clerk and master. The order of January 19, 1983, appointing

Carolyn P. McMahan Clerk and Master is valid and the motion is overruled. Costs incident to the filing of the motion are taxed to Peggy Marshall.

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T
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R

/S/
Chancellor, by Designation

Approved as to form:

/S/
J.D. Lee
Attorney for Peggy Marshall

/S/
Sandra G. Olive by AM.
Attorney for Peggy Marshall

/S/
John A. Walker, Jr.
Attorney for Carolyn P. McMahan

10/76

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSE

IN RE: Appointment of Clerk and Master

NO. 83-02-065

APPEARANCES:

FOR PEGGY MARSHALL

J.D. Lee
Sandra Olive
Attorneys at Law
Knoxville, Tennessee

FOR CAROLYN McMAHAN

John Walker
Attorney at Law
Knoxville, Tennessee

BEFORE:

Hon. Richard E. Ladd

Date:

August 23, 1983

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following is the Findings of Fact and Conclusions of Law rendered by the Hon. Richard E. Ladd on August 23, 1983, in the matter of appointment of Clerk and Master, after having heard argument of counsel for the respective parties.

THE COURT: I find as follows:

As represented by Exhibit No. 8, Ms. Peggy Marshall was initially appointed Clerk and Master on September 18, 1964, and after six years approximately was reappointed on September 1, 1970. She resigned on September 1, 1975, five years after the last appointment; re-appointed on September 1, 1975; resigned again on June 1, 1978, some two years and nine months after the last appointment; re-appointed on June 1, 1978.

The record further reflects that Chancellor McSween's term ended on September 1, 1978, and Chancellor Rainwater took office on 9-1-78. Under date of January 19, 1983, Chancellor Rainwater entered an Order holding that Ms. Marshall's term as Clerk and Master had previously expired and she was only acting in a hold-over capacity, and appointed Mrs. McMahan as Clerk and Master. Ms. Marshall filed a timely Motion on February 10, 1983, contesting th validity of Chancellor Rainwater's Order and insisting her term did not expire until six years from her last date of appointment or on June 1, 1984.

Article 6, Section 13 of the Constitution of Tennessee (1870) provides that Chancellors shall appoint their Clerk and Masters, who shall hold their offices for six years. This is further codified under Tennessee Code Annotated, Section 18-5-101. Although the Constitution of 1870 set out a schedule setting forth when the previous Clerk and Master's terms would expire and when the new Clerk and Masters, after the election of 1870 would begin, the Constitution does not provide a set schedule of beginning and ending of terms on certain dates for Clerk and Masters as it does set forth for other officers as contained in Article 7, Section 5 of said Constitution.

Thus, under the clear language of the Constitution and the cases interpreting it, such as *Stafford v. Williams,* 13 SW 793 (1889) and the legislative intent reflected by Statutes such as TCA Section 18-2-213, the appointment of Clerk and Masters shall be for a full six year term of office. Thus, it would not be proper to go back to the appointment of first Clerk and Master in Sevier County in 1870 and count off six year terms to determine the day when a Clerk and Master's term ends.

Although some of the old cases use the wording "full term", I find nothing else exists other than a full term under the Constitution, since the Constitution directs that the terms shall be for six years.

Thus, under these facts, had Ms. Marshall's term of six years expired on January 19, 1983, and was she holding office, or was she holding office as a hold-over under Article 7, Section 5 of the Constitution. That's really the sole issue in this matter.

All parties agree that no Tennessee case is directly in point, and therefore we must look to the intent and purpose behind Article 6, Section 13 of the Tennessee Consitution.

The drafters of the Tennessee Constitution recognized the unique quasi judicial position of Clerk and Master. The position of Clerk and Master to Chancellor is not unlike the position of Lord High Chancellor to the King of England many years ago. In fact, that's where we get our present Chancery Court. Initially, before the formal creation of Chancery Court, the King's Lord High Chancellor performed judicial work for the King, but always subject to confirmation by the King.

Likewise, the Clerk and Master, in 1870 and today, is handed or referred difficult judicial decisions, but always subject to confirmation or ratification by the Chancellor. This relationship of Chancellor and Clerk and Master has been unique to the law until recently, and now the Federal Court system has a similar system, with appointment power in the District Judges.

The drafters of the Constitution recognized that the Chancellor should have the power to appoint or select

this person — this person known as Clerk and Master, who would be referred important judicial matters and to be Chancellor's alter ego. Likewise, the drafters of the Consitution recognized that Chancellors, like Kings, can be fickle in their wishes as to who was to make these difficult judicial decisions for them, and recognized that to get qualified persons to serve as Clerk and Master, some form of security must be given to these persons.

In the drafters' infinite wisdom they chose a term of six years — no more, no less. Elected officials do not get the same security. They only serve for the unexpired term until the next General Election, and then serve, if elected, to a full term.

Clearly, the intent of the Constitution was to create a balance between the conflicting needs of the Chancellor to have the power of appointment, against the needs of the Clerk and Master for security for six years. Thus, once again I state it is clear an appointment is for six years — no more, no less.

I find the practice of a Clerk and Master resigning prior to the expiration of the six year term and immediate reappointment, is void and of no effect, as it is contra to the clear intent and purpose of the Constitution and the basic purposes and principles of the Chancery Court.

An elected official can not, prior to expiration of his term, choose a time of favorable political waters, to resign an then be elected or appointed to another full term. Likewise, the clear intent of the Constitution is that a Clerk and Master can not do so. To permit such an act by Clerk and Master and a Chancellor would effectively defeat the Constitutional right of the Chancellor to appoint his Clerk and Master and throw out of balance — that balance set up in the Constitution — between the right of the Chancellor to appoint and the right of security of the Clerk and Master of six years.

In Section 17 of *Gibson's Suits in Chancery,* Sixth Edition, Chancellor Inman sets forth "The Twelve Tables of Equity", which are the foundation stones of the Chancery Court. Number 6 provides that: "Equity requires him who seeks Equity to do Equity." Number 10

provides: "Equity looks to the intent rather than to the form". Number 12 provides: "Equity requires diligence, clean hands and good faith".

I find the practice of resigning and re-appointment as took place on June 1, 1978, some ninety days before Chancellor Rainwater took office, violates all three of the above stated rules of equity. Conceding this Court's conscience may be more sensitive than others, I find the practice that took place on that day to shock the conscience of this Court.

Rule No.5 provides that: "Equity regards that as done which ought to be done". I therefore find that since Ms. Marshall's initial appointment on September 11, 1964, her six year term should have been served with the first term ending 9-18-70; the second, on 9-18-76; and the third, on 9-18-82, and there being no valid appointment of her since the ending of the last term on September 18, 1982, I find that Chancellor Rainwater was correct in entering the Order of January 19, 1983, and the Motion of Ms. Marshall is overruled.

The costs are taxes to Ms. Marshall. Mr. Walker, prepare an Order in conformity with the Court's findings.

MR. WALKER: Very well, your Honor.

THIS IS ALL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RENDERED BY THE COURT IN THIS CASE ON AUGUST 23, 1983.

/S/

Judge

APPENDIX C

IN THE CHANCERY COURT OF SEVIER COUNTY, TENNESSE

IN RE: APPOINTMENT OF CLERK AND MASTER

ORDER

It appearing to the Court that the term of Office of Peggy Marshall, as Clerk and Master of the Chancery Court of Sevier County, Tennessee, having previously expired, and she having held over as such Clerk and Master in accordance with the provisions of Article 7, Section 5, Constitution of the State of Tennessee, the Chancellor now deems it proper and expedient to fill the existing vacancy and therfore has this day issued a Letter of Appointment to Carolyn P. McMahan as such Successor Clerk and Master.

IT IS, THEREFORE, ORDERED that upon the proper qualification and induction into Office of Carolyn P. McMahan, as Clerk and Master of Sevier County, Tennessee, all records, funds, etc. of the Office of Clerk and Master be immediately delivered to her as provided by law.

ENTERED, this 19th day of January, 1983.

/S/

CHANCELLOR

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

IN THE MATTER OF THE
APPOINTMENT OF CLERK AND MASTER

TO: MRS. CAROLYN P. McMAHAN

By authority granted to me, and having full confidence in your ability, integrity, and diligence, I hereby appoint you Clerk and Master of the Chancery Court of Sevier County, Tennessee, for the remainder of the current unexpired term, to take charge of said office honorated to you with its responsibilities, and you will be authorized to exercise the powers and to do and perform the duties pertaining thereto, and you will be entitled to receive the fees and emoluments thereof for the term aforesaid and until your successor in office shall have been appointed and qualified.

This January 19, 1983.

Respectfully,

/S/

CHANCELLOR

APPENDIX D

APPOINTMENT OF PEGGY MARSHALL AS CLERK & MASTER, CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

******

It is a genuine pleasure to reward your diligence in the performance of the duties of the office which you now hold.

Your standards of operation of the office during the terms in the office justify the confidence which this reappointment signifies.

I hereby reappoint you for a full term as Clerk & Master of the Chancery Court for Sevier County, Tennessee.

You may enter this instrument of record and proceed to assume all the duties of this office upon the filing of required bonds and taking the oath of office.

/S/

James C. McSween, Jr.,
Chancellor

ENTER:

June 1, 1978

OATH OF OFFICE

I, PEGGY MARSHALL, do solemnly swear that I will support the Constitution of the United States and of this state, and to execute the duties of this office without prejudice, partiality, or favor, to the best of my skill and ability; also, that I have neither given nor will give to any person any qratuity, gift, fee, or reward in consideration of my support for the office, and that I have neither sold nor offered to sell, nor will I sell, my interest in my office, as Clerk & Master of Sevier County, which is a part of the Thirteenth Chancery Division, State of Tennessee.

/S/
Peggy Marshall

Sworn to before me this 1st day of June, 1978.

/S/
James C. McSween, Jr.,
Chancellor

(2)

Office-Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PEGGY MARSHALL, Petitioner,

v.

CAROLYN P. McMAHAN

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

J.D. Lee*
14th Floor, Andrew
Johnson Plaza
912 S. Gay Street
Knoxville, TN 37902
615/544-0101

Sandra G. Olive
Suite 504
9051 Executive Park Dr.
Knoxville, TN 37923
615/690-5300

ATTORNEYS FOR
PETITIONER

*Counsel of Record

12pp

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

Filed May 7, 1984

RE: APPOINTMENT OF CLERK AND MASTER FOR SEVIER COUNTY

SC 25-

Sevier Chancery 83-02-065

OPINION

Appellant, Peggy Marshall, seeks to overturn the order of the Chancery Court for Sevier County recognizing her hold-over status as Clerk and Master of the Chancery Court for Sevier County and appointing in her place and stead a new Clerk and Master, appellee, Carolyn P. McMahan.

The incombent Chancellor, Honorable Chester Rainwater, entered the contested order on January 19, 1983. Thereafter, on February 10, 1983, appellant, Peggy Marshall, filed a "Motion" in said Chancery Court, contesting her "removal" and praying that the Chancellor's order

of January 19 be set aside. In that pleading the appellant denied that at the time the order was entered she was a mere holdover and denied the authority of the Chancellor to "remove" her from office and appoint a successor in her place. She also asserted that her rights had been denied because she was given no notice prior to the entry of that order that she was to be removed and a successor appointed. Thereafter, Carolyn B. McMahon, appellee, filed a "Response to Motion" asserting that at the time the Chancellor's order of January 19, 1983, was entered the constitutional term of office of appellant, Peggy Marshall, as Clerk and Master for Sevier County, had expired, thereby authorizing the Chancellor to make an appointment of a new Clerk and Master.

The Honorable Richard E. Ladd, Law and Equity Judge, was designated by the Chief Justice to hear this matter on the merits in the place of Chancellor Rainwater. Follow-

ing a trial on the merits, Chancellor Ladd determined that appellant, Peggy Marshall, was a holdover Clerk and Master when Chancellor Rainwater entered his order of January 19, 1983, and that the said order recognizing that her term had expired and appointing Carolyn P. McMahon, appellee, as the new Clerk and Master was in all respects valid and effective.

It appears that appellant Marshall was first appointed Clerk and Master for Sevier County on September 18, 1964; that she was reappointed to that office on September 1, 1970; that on September 1, 1975, she purported to resign that office but on the same date was reappointed for a full term; that on June 1, 1978, she again purported to resign, but on the same date was reappointed "for a full term." She claims a six year term beginning June 1, 1978, and ending June 1, 1984.

The decree under review holds:

". . . that the reappointment of Peggy Marshall (on) June 1, 1978, immediately after her resignation as Clerk and Master on said date, is void and of no effect. The said Peggy Marshall having been first appointed Clerk and Master on September 18, 1964, her six year term of office expired September 18, 1970, her second term of office expired September 18, 1976, and her third appointment would have expired September 18, 1982. The court holds that there has been no valid appointment of a Clerk and Master of Sevier County since September 18, 1982, and that on January 19, 1983, Peggy Marshall was holding the office of Clerk and Master only as a holdover Clerk and Master. The order of January 19, 1983, appointing Carolyn P. McMahon Clerk and Master is valid and the motion is overruled."

In his findings of fact and conclusions of law, Judge Ladd states the following:

"Article VI, Section 13, of the Constitution of Tennessee (1870) provides that Chancellors shall appoint their Clerks and Masters, who shall hold their offices for six (6) years. This is further codified under Tennessee Code Annotated, § 18-5-101. Although the Constitution of 1970 set out a schedule setting forth when the previous Clerk and Masters' terms would expire and when the new Clerk and Masters', after the election of 1870, would begin, the Constitution does not provide a set schedule of beginning and ending of terms on certain dates for Clerk and Masters as it does set forth for other officers as contained in Article VII, Section 5, of the Constitution.

> "Thus, under the clear language of the Constitution and the cases interpreting it, such as Stafford v. Williams, 13 S.W. 783 (1889), and the legislative intent reflected by a statute such as T.C.A., § 18-2-213(b), the appointment of Clerk and Master shall be for a six (6) year term of office. Thus, it would not be proper to go back to the appointment of the first Clerk and Master of Sevier County in 1870 and count off six year terms to determine today when the Clerk and Master's term ends.
>
> "Although some of the old cases use the wording 'full term' I find nothing else exists other than a full term under the Constitution since the Constitution directs that the term shall be for six (6) years."

We fully concur in these findings and conclusions of law announced by Judge Ladd.

Article VI, Section 13, of the Constitution of Tennessee provides:

> "Chancellors shall appoint their Clerks and Masters, who shall hold their offices for six (6) years. Clerks of the inferior courts holden in the respective counties or district, shall be elected by the qualified voters thereof for the term of four (4) years. Any clerk may be removed from office for malfeasance, incompetency or neglect of office, in such manner as may be prescribed by law."

It should be noted that this provision stipulates no time for the beginning of the term

of office of the Clerk and Master, once appointed. Article VII, Section 5, of the Constitution of Tennessee provides:

> "Elections for judicial and other civil officers shall be held on the first Thursday in August, One Thousand Eight Hundred and Seventy (1870), and forever thereafter, on the first Thursday in August next preceding the expiration of their respective terms of office. The term of each officer so elected shall be computed from the first day of September next succeeding his election."

This provision applies to all elective officers but does not apply to offices such as Clerk and Master which is always filled by appointment of the Chancellors rather than by election by the people.

As noted by Judge Ladd, Section 1 of the Schedule to the Constitution of 1870 provides, in part:

> "Officers appointed by the courts shall be filled by appointment, to be made and to take effect during the first term of the court held by Judges elected under this Constitution."

The provision just quoted from the Schedule was construed by this Court in Gold v. Fite,

61 Tenn. 237 (1872). It was there held that the provisions requiring the appointment of appointive officers by the courts to be made and to take effect during the first term of court held by judges elected under the Constitution did not imperatively require the appointment to be made at the first term, and an appointment made at a subsequent term was valid. The purpose and intent of the provision was to limit the terms of the then incumbents in such offices, and to confer the power upon such courts to appoint their successors at their first terms, but not to deprive them of the power to do so afterwards, if not done at the first term. For instance, where the Chancellor failed to appoint a Clerk and Master at the first term of his court held under the Constitution, the then incumbent continued to hold the office under Article VII, Section 5, of the Consittution until the appointment and qualification of his successor, but this provision

in the Schedule did not deprive the Chancellor of his power existing under Article VI, Section 13, of the Constitution to appoint the Clerk and Master at a subsequent term

> ". . . to hold for the Constitutional term of six (6) years from the date of his last appointment." 61 Tenn. at 250.

The statutory provision for the appointment of Clerks and Masters is really declaratory of the above quoted provision from Article VI, Section 13, of the Constitution. Thus, T.C.A., § 18-5-101, provides:

> "The clerks of the chancery courts are appointed by the respective chancellors, and hold their offices for six (6) years."

Nothing is there specified about the beginning and the ending of the six year term of Clerks and Masters. However, another provision of the Code does indicate the construction placed upon Article VI, Section 13, by the legislature respecting the beginning of the terms of Clerks and Masters. T.C.A., § 18-2-213, provides:

"(a) Should any clerk or clerk and master fail to comply with such order of his court, it shall be the imperative duty of the court to remove him, and appoint some other person in his [place].

"(b) If the removal be of a clerk elected by the people, the appointment shall be to fill the unexpired term, but if the removal be of a clerk and master, or other clerk whose appointment is by law vested in the court, the appointment shall be for a full term of office." (Emphasis added.)

We hold, therefore, that the term of office of each Clerk and Master begins with the date of his appointment by the Chancellor and extends for six (6) years thereafter, unless it be interrupted by death, removal as provided by law, or by resignation. Then, upon the appointment of a new Clerk and Master his term shall be for the period of six (6) years next ensuing after his appointment.

Moreover, we fully agree with the conclusion of the Chancellor that the term of a Clerk and Master may not be manipulated and altered from the course set by the law as above stated, by his feigned resignation and a simultaneous reappointment by the Chancellor

prior to the termination of the current term of office of six (6) years. Such bogus "resignations and reappointments" are to be disregarded in determining the lawful tenure of a Clerk and Master. Of course, a Clerk and Master may lawfully resign his office prior to the expiration of his six (6) year term of office; but, if he does so, he may not be reappointed to that office unless some other person has intervened as such Clerk and Master by a bona fide appointment.

We affirm Judge Ladd's conclusion that since appellant Marshall was first appointed Clerk and Master of Sevier County on September 18, 1964, her lawful terms of office were as follows:

September 18, 1964, through September 18, 1970;

September 18, 1970, through September 18, 1976;

September 18, 1976, through September 18, 1982.

Since her last valid term of office expired on September 18, 1982, she was hold-

ing over at the time of the Chancellor's order entered January 19, 1983, under the provisions of Article VII, Section 5, that "Every officer shall hold his office until his successor is elected or appointed, and qualified."

We find no error in the decree of the trial court; we, therefore, affirm it and tax the costs against appellant, Marshall.

/S/

BROCK, J.

Fones, C.J., Cooper and Harbison, JJ., and Tatum, Sp. J., Concur

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-388

In The

Supreme Court of the United States

October Term, 1984

PEGGY MARSHALL,

Petitioner,

v.

CAROLYN P. McMAHAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

JOHN A. WALKER, JR.
Counsel of Record
715 First American Center
P.O. Box 2774
Knoxville, Tennessee 37901
(615) 523-0700

Attorney for Respondent
Carolyn P. McMahan

Of Counsel:

WALKER & WALKER, P.C.
715 First American Center
P.O. Box 2774
Knoxville, Tennessee 37901
(615) 523-0700

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QUESTIONS PRESENTED

1. Whether appointment of a successor clerk of court when the term of the predecessor clerk had expired, prior to a hearing on the issue of the length of the term of the predecessor clerk, raises a substantial federal question of due process of law within the meaning of the Fourteenth Amendment.

2. Whether this case is moot, the term of the predecessor clerk having now expired even under her theory of the case.

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No. 84-388

In The

Supreme Court of the United States

October Term, 1984

PEGGY MARSHALL,

Petitioner,

v.

CAROLYN P. McMAHAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT OF THE CASE

Respondent generally agrees with the chronology of events set forth in the Petitioner's Statement of the Case.

REASONS FOR DENYING THE PETITION

Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1257(3) on the theory that her tenure as a court clerk was terminated before she had an opportunity for a hearing, in violation of the Due Process

Clause of the Fourteenth Amendment (Petition, pp. 22-27). However, the Petition should be denied because (1) the federal question is insubstantial, since Petitioner was in fact accorded a hearing and therefore "due process," and (2) the issues raised by Petitioner are moot.

Insubstantial Federal Question

For this Court to grant a petition for certiorari pursuant to 28 U.S.C. § 1257(3), the federal question must be substantial. *Zucht v. King,* 260 U.S. 174 (1922); *Duncan v. Tennessee,* 405 U.S. 127 (1972). It is well settled law that not every mere allegation of a federal question will suffice to give jurisdiction and this Court will not undertake to review a case where the federal question has been settled by prior decisions of this Court. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311, 314-15 (1902); *Milheim v. Moffatt Tunnel Improvement District,* 262 U.S. 710, 717 (1923).

The dispositive issue in this case was one solely of Tennessee law, *i.e.,* whether the purported appointment of a clerk and master of a chancery court was valid. That issue was fully resolved by a final judgment entered by the Supreme Court of Tennessee on May 7, 1984. In re *Appointment of Clerk & Master for Sevier County,* 670 S.W.2d 215 (Tenn. 1984), *rehearing denied,* 1984. That decision of necessity also determined the validity of the procedures followed at the trial court level (Petitioner's "main goal" (Petition, p. 21)). The only hint of a federal question raised at any stage below was the lack of a hearing prior to the order of the state trial judge appointing a new clerk (Petition, pp. 22-23).

Petitioner was in fact accorded a full evidentiary hearing on the merits (Petition, pp. 11-12, 22, B-5 to B-8). Exhibits were received and the trial judge explicitly invited both parties to introduce any other proof either party desired *(Id.,* p. 22). That hearing fully satisfied the requirements of the Due Process Clause. Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered. *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); *Wilson v. Standefer,* 184 U.S. 399 (1902).

—o—

BRIEF IN OPPOSITION TO PETITION

Where, as here, only property rights are involved (Petition, pp. 23-24), the mere postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination is adequate. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *Phillips v. Commissioner,* 283 U.S. 589 (1931).

Thus the "federal question" is "so wanting in substance as not to need further argument." *Milheim v. Moffatt Tunnel Improvement District,* 262 U.S. 710 (1923).

"Mootness"

The gravamen of Petitioner's action below was to seek reinstatement as clerk and master of the chancery court (Appendix B to Petition). Under her theory of the case her appointment of June 1, 1978 began a six-year term (Petition, p. 19). Thus, even under her theory, her term would have expired May 31, 1984. Reinstatement is no longer available as a remedy. The only money dam-

ages requested were "her accrued emoluments of office since her removal." (Petition, p. 11). The Tennessee Supreme Court necessarily determined that since her term had expired, there were no such "accrued emoluments of office" owed to Petitioner. In re *Appointment of Clerk and Master for Sevier County, Tennessee,* 670 S.W.2d 215 (Tenn. 1984). Review of the state law issue is not sought in this Court nor could it be properly sought, since this Court has no power to revise judgments of state courts on questions of state law. *Henry v. State of Miss.,* 379 U.S. 443 (1965); *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960).

Since reinstatement is no longer available and no other remedy is sought in this Court, the case is moot. *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747 (1976); *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

—o—

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. WALKER, JR.
Counsel of Record
WALKER & WALKER, P.C.
715 First American Center
P.O. Box 2774
Knoxville, TN 37901
(615) 523-0700

Attorney for Respondent
CAROLYN P. McMAHAN